

IN THE SUPREME COURT OF THE UNITED STATES

TERM, 1978

78-5255

No. _____

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

RODNEY J. KELLEY, APPELLANT

VS.

~~JOHN OF CONNORSTON~~, VERMONT, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF STATE OF VERMONT

JURISDICTIONAL STATEMENT

Rodney J. Kelley
Appellant

15 Pearl Street
Brattleboro, Vermont 05301

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APPEAL FROM THE SUPREME COURT OF VERMONT

JURISDICTIONAL STATEMENT

Appellant submits herewith his jurisdictional statement as required by Rule 15 of the Rules of the Supreme Court of the United States.

OPINION BELOW

On June 28, 1978, by Entry Order of the Supreme Court of Vermont, an opinion of that court was rendered which denied the appellant's Motion for Reargument to that Court which raised the following questions: That the Court had overlooked or misapprehended points of law or fact, which were presented and which would probably have affected the result of the court's earlier decision; that the statute 24 Vermont 4444 as written and applied in this case results in cruel and unusual punishment in violation of the Constitution of the United States; that the appellee had never served notice by certified mail as required under 24 Vermont 4444; that the Defendant was entitled to appointment of counsel; that the appellant was entitled to withdraw his plea before sentencing; that a Judge Feinberg signed the Information accepting appellant's plea of nolo contendere although appellant had entered such plea before a Judge Divoll; that the appellant had been in error in entering a plea bargain with appellee; that it was beyond the power of the Supreme Court of Vermont to modify the judgment of the lower court; that appellee never obtained a search warrant to enter Appellant's property on any occasion. (Attached as Appendix A).

On June 6, 1978 by Entry Order of the Supreme Court of Vermont and accompanying opinion, a decision was rendered which

reduced the fine from sixteen hundred dollars to fifteen hundred dollars and affirmed judgment as amended. (Attached as Appendix B)

GROUNDS OF JURISDICTION

a. This is an appeal from a decision of the Supreme Court of Vermont denying an appeal to it by appellant and a Motion for Re-argument by appellant. The appeal to that court was based upon:

1. An unkept plea bargain on the part of the appellee.
2. The denial of rights, both civil and constitutional, to the appellant in the lower court.
3. Judicial misconduct in the lower court.
4. The error of the lower Court in not appointing counsel for appellant.
5. The error of the Court in not allowing appellant to withdraw his plea prior to sentencing.
6. The error of the lower court in interpreting the record regarding the plea bargaining agreement.
7. The error of the lower court in overruling appellant's Motion for a new trial.

The motion for reargument was based upon:

1. That the Appellate court had misapprehended or overlooked points of fact or law, which were presented and which would probably have affected the result.
2. That the Statute 24 Vermont 4444 as written and applied in this case results in cruel and unusual punishment in violation of the Constitution of the United States.
3. That the appellee had never served appellant notice by certified mail as required under 24 Vermont 4444.

4. That it was beyond the power of the Supreme Court of Vermont to modify the judgment of the lower court.

5. That the appellee had never obtained a search warrant to enter appellant's property.

6. That the appellant was in error in entering any plea bargain with appellee.

7. That a Judge Feinberg signed the Information accepting the plea for the Court, but the plea had been made previously before another Judge Divoll.

This proceeding is brought pursuant to 28 USC 2106.

The case in the lower court was a criminal action charging appellant with thirty (30) counts of violation of a local zoning ordinance brought by the appellee Town of Dummerston, Vermont.

b. The date of the judgment or decree sought to be reviewed of the Supreme Court of Vermont is June 28, 1978 at 11:04 A.M., denying Motion for Reargument.

The date of the judgment or decree sought to be reviewed of the Supreme Court of Vermont is June 6, 1978. No time of such decision's entry is to be found on such entry order. This judgment is the opinion of the appeal.

The date of the filing of the Notice of Appeal to the Supreme Court of the United States was ~~August~~ 26 July 1978. Such Notice of Appeal was filed with the Supreme Court of Vermont and the District Court of Vermont, Unit No. 6, Windham Circuit, as the latter court was the one possessed of the record.

c. The statutory provision conferring jurisdiction on appeal is 28 USC 2106, supported by Fourth Amendment to the Constitution of the United States, the Fifth Amendment to the Constitution of the United States, the Sixth Amendment to the Constitution of the

United States, the Eighth Amendment to the Constitution of the United States, the Fourteenth Amendment to the Constitution of the United States, Rule 11 of Federal Rules of Criminal Procedure, Rule 53 of Rules of Supreme Court of United States, and the Judicial Code.

d. Cases sustaining the jurisdiction are:

1. Dixon vs. Duffy (1952) 344 US 143, 97 L Ed 153, 73 S Ct 193: Supreme Court of United States, alone, is final arbiter of state prisoner's claim that he had been deprived ~~of~~ his rights under federal constitution.
2. Walling v James V. Reuter, Inc. (1944) 321 US 671, 88 L Ed 1001, 64 S Ct 826: Where, for any reason, Supreme Court of United States may not properly proceed with case brought to it on appeal, or where it is without power to proceed with appeal, it may nevertheless, in exercise of its supervisory appellate power, make such disposition of case as justice requires.
3. Urie v Thompson (1949) 337 US 163, 93 L Ed 1282, 69 S Ct 1018, 11 ALR2d 252: Federal question is subject to independent review by United States Supreme Court and is not to be taken as governed conclusively by state court decisions.
4. Smith v United States (1959) (CA 10 Okla) 273 F2d 462, cert den 363 US 846, 4 L Ed 2d 1729, 80 S Ct 1609 Appellate courts should overrule previous decisions only for most compelling reasons, particularly where error cannot be corrected without substantial injury to litigants.
5. Frith v Blazon-Flexible Flyer, Inc. United States Court of Appeals is empowered by 28 USCS 2106 to vacate or set aside any decree lawfully brought before that court for review. (1975) (CA Miss) 512 F2d 899, reh den (CA 5 Miss) 515 F2d 1183
6. Saldana v United States (1961) 365 US 646, 5 L Ed 2d 855, 81 S Ct 1111

Ct 783: Federal convictions of crime will be set aside by Supreme Court of United States where it appears, from suggestion of Solicitor General and from court's independent examination of record, that combination of circumstances in case, beginning with one judge's expressed intention to impose 5-year sentence and ending with another judge's imposition of 20-year sentence was not consistent with fair administration of justice.

7. Minnesota v National Tea Co. (1940) 309 US 551, 84 L Ed 920, 60 S Ct 676: In case of obscurity as to precise grounds for judgment of state court under appeal to Supreme Court of United States, and consequent uncertainty as to whether or not state court rested its decision upon construction of Constitution of United States, judgment of state court may properly be vacated and cause remanded to state court so that uncertainty may be removed.

8. United States v Wiley (1975) 170 App DC 382, 517 F2d 1212: Under authority of 28 USCS 2106, appellate court may, on direct appeal of criminal case, reverse in interest of justice on grounds that have constitutional aura, but are not considered to amount to constitutional violation.

9. United States v Eucker (1976, CA 2 NY) 532 F2d 249, later op (CA2 NY) 537 F2d 718: Where there was possibility that defendant's plea was made without understanding nature of charge against him, Court of Appeals would, pursuant to authority of 28 USCS 2106, remand case to District Court so that appellant might apply to that Court for leave to withdraw plea of guilty on ground that it was not knowingly made as required by USCS Rules of Criminal Procedure, Rule 11.

10. James-Dickinson Farm Mortgage Co. v Harry (1927) 273 US 119 71 L Ed 569, 47 S Ct 308: In case properly before Supreme Court of United States on constitutional grounds, jurisdiction of Supreme Court extends to review of all questions involved.

e. The validity of 24 Vermont 4444: Enforcement; penalties is questioned. (Attached as Appendix C)

QUESTIONS PRESENTED

Questions presented by the appeal expressed in terms and circumstances of the case are:

1. Was the Supreme Court of Vermont correct in modifying the sentence of the appellant rather than remanding the case to the trial court to do this?

2. Was the appellant denied his right of effective assistance of counsel? (Sixth Amendment)

3. Was conviction obtained by plea of nolo contendere which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea? (Rule 11 of Federal Rules of Criminal Procedure)

4. Was conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, against the Fourth Amendment?

5. Was Appellant entitled to withdraw his plea prior to sentencing? (Federal Rules of Criminal Procedure)

6. Is 24 Vermont 4444 cruel and unusual punishment as within meaning of Fifth and Eighth Amendments?

7. Was the sentencing Judge, George Feinberg, biased and prejudiced against the appellant so as to deny him a fair hearing as required under Fifth and Fourteenth Amendments and Judicial Code?

8. Was appellant in error to enter into any plea bargain with

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appellee? (Rule 11 of Federal Rules of Criminal Procedure)

9. Did the appellant keep his part of the plea bargain and thus is entitled to have bargain enforced? (Rule 11 of Federal Rules of Criminal Procedure) and appellee did not?

10. Was Appellant denied due process of law under Fourteenth Amendment in that he was never served a Notice of Zoning Violation as required by 24 Vermont 4444?

11. Can one Judge sign an Information accepting a plea for a court when the plea had been made one month previous before another Judge?

12. Was appellant denied equal protection under the Fourteenth Amendment by the lower and appellate courts of Vermont?

STATEMENT OF THE CASE

1a. The question the power of the Supreme Court of Vermont to modify judgment of the lower court was raised by appellant in his Motion for Reargument to the appellate court.

b. This question was raised by Motion, the Motion for Reargument.

c. The question was ignored by the Supreme Court of Vermont.

d. Entry Order of June 26, 1978 states: "Motion for Reargument and Stay denied."

2a. The question of right to counsel was raised in the lower court by application of appellant to public defender for representation which was denied. The question was raised in appellant's brief to appellate court.

b. The question was raised by applying for counsel to the public defender's office, before any hearings except arraignment.

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c. The public defender was denied appellant by the letter of Public Defender to Appellant informing him of such denial by lower court; appellate court stated "without merit."

d. The letter states: "Please be advised that the Vermont District Court has denied your request for Public Defender assignment."

3a. The question of the induced plea of nolo contendere was made by a letter to the Court on 4 August 1977, the day after the plea was entered, and by Motion for Reargument to Supreme Court, of Vermont.

b. The question was raised in lower court by letter to court dated 4 August 1977, and by Motion for Reargument to Vermont Supreme Court.

c. The sentencing Judge Feinberg read the letter into the record on October 4, 1977. The appellate court made no mention of it.

d. The letter states: "...realizing that it was a mistake for me to have entered into a plea bargain of any sort with virtually no time to consider it or its consequences, ..."

4a. The question of a search warrant was to be presented at the omnibus hearing in the lower court, and in appellant's Motion for Reargument.

b. The question was to be raised by Motion to Dismiss, and was raised by Motion for Reargument.

c. The Omnibus hearing never took place in the lower court; that is when appellee approached appellant with plea bargain. Appellate court made no mention.

d. By Response to Request for Discovery by the Defendant (Appellant) dated 23 July 1977 Appellee stated in Paragraph 2, Page 2 as follows: "There are no transcripts of any grand jury

proceedings or transcripts of any inquest proceedings, no reports or statements of experts and no search warrants."

5a. The question of withdrawal of plea prior to sentencing appeared in the lower court in the letter mentioned in above question 3, and on Page 22, lines 22 thru 25 of the Transcript, and in the Motion for Reargument of the appeal, and in the brief.

b. In the lower court the question was raised by oral motion; in the appellate court by written motion.

c. The lower court denied the Motion, and the appellate court made no mention of it, except to state appellant had not met his burden.

d. "...make a motion that my plea be withdrawn and we continue with the case..."

6a. The question of the constitutionality of 24 Vermont 4444 was to be raised as a Motion to dismiss at the omnibus hearing in the lower court, and was raised in Motion for Reargument in the appellate Court.

b. The question was to be raised by the Omnibus hearing Motions, and was raised by the Motion for Reargument.

c. The Omnibus hearing never took place; the appellate court made no mention of it.

d. "...that the statute as written and applied in this case results in cruel and unusual punishment in violation of the Constitution of the United States, and..."

7a. The question of the bias of the Judge Feinberg came up at sentencing on page 35, lines 3 thru 6. in the lower court, and in the brief of the appellant (Point of Error 4).

b. The question was raised by oral motion in the lower court, and as a point of error in the brief for the appellate court.

c. The lower court denied the motion and the appellate court

stated that the claim was without merit.

d. The disqualification question is on Page 35 of Transcript, Point 4 of Brief, and Page 2 of Opinion of Vermont Supreme Court, Entry order of June 6, 1978.

8a. The question of the error of entering into a plea bargain came in the letter of 4 August 1977 to the Court, the day after plea, and in the appellate court in the Motion for reargument.

b. In the lower court the question was raised by letter; in the appellate court by motion.

c. The lower court overlooked the question, as did the appellate court.

d. "...That it was a mistake for me to have entered into a plea bargain of any sort..."

9a. The question of the appellant's part of the plea bargain is found throughout the Transcript, more specifically, page 22, lines 14 thru 16, in the lower court, and in the Brief of the appellant.

b. The question was raised by oral argument in the lower court and by Point of error in the appeal brief.

c. The trial court alleged noncompliance on appellant's part, which was affirmed by the appeals court.

d. Page 22 of Transcript, Page 2 of Opinion of June 6, 1978 of appellate entry order.

10a. In the lower court the question of no Notice of Violation was to have been presented in Omnibus hearing; at the appeals level the question was presented by Motion for Reargument.

b. The omnibus hearing never came about, and the appellate court made no mention of the Notice.

11a. As this error was pointed out at the appellate level by a member of the Vermont Supreme Court, no mention was made at the lower court.

When stated in the Motion for Reargument, by appellant, no mention was made by the appeals court.

12a. The question was presented in the lower court at the Sentencing, page 23 line 5 and on; at the appellate level as Point 7

b. In the lower Court the question was raised by oral argument regarding equal protection, and as a point of error on appeal.

c. The lower court overlooked the question, and the appeals court made no mention of it, either.

d. Starting on page 23, specifically, and continuing thru the transcript.

FEDERAL QUESTIONS ARE SUBSTANTIAL

This case concerns a criminal case where defendant-appellant was denied right to counsel, and rather than have a number of Motions presented at the Omnibus hearing which could result in the dismissal of the charges, or to have a jury bring in a verdict of "not guilty", the appellee instead took advantage of the appellant who without an attorney, agreed to enter a plea on the assumption that his compliance would end the case. The appellant had no way of knowing that once a plea is entered, a court can use that against a defendant and pursue the defendant on those grounds that the plea was made voluntarily and that whatever the prosecution seeks is to be rendered, even if it is not called for by law.

That the case did not give appellant a fair and impartial hearing is sufficient to allow review and to reverse or remand the case. Here many Amendments to the Constitution were violated, as were many Rules of the Federal Rules of Criminal Procedure.

In Honeyman v Hanan (1937), 300US 14, 81 L Ed 475, 57 S Ct

350 the decision on whether or not Federal question was apparent was:

"Where record on appeal to Supreme Court of United States from decision of state court leaves Supreme Court uncertain as to whether federal question was necessarily passed upon by state court, Supreme Court will vacate judgment and remand cause to afford opportunity to amend record, so as to show nature of federal question, how it was raised, and grounds of its disposition."

In United Gas Public Service Co. v Texas, (1938) 303 US 123, 82 L Ed 702, 58 S Ct 483, reh den 303 US 667, 82 L Ed 1124, 58 S Ct 483

"The Supreme Court of United States will review findings of fact by state court: (1) where federal rights have been denied as result of findings shown by record to be without evidence to support it; and (2) where conclusion of law as to federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon federal question, to analyze facts."

Under the topic of violation of prosecutorial policy, under 28 USCS 2106, "Supreme Court of the United States has power to vacate judgment of conviction with directions to dismiss indictment upon motion of government, consented to by defendant, based on ground that prosecution violated government's policy...and court will so dispose of matter with due regard to rule that it will not anticipate question of constitutional law in advance of deciding it. Petite v United States (1960) 361 US 529, 4 L Ed 2d 490, 80 S Ct 450.

CONCLUSION

Appellant submits that this appeal brings before the court substantial questions which require plenary consideration, with briefs or the merits and oral argument, for their resolution.

Dated: 14 August 1978

Rodney J. Kelley
Rodney J. Kelley
15 Pearl Street,
Brattleboro, Vermont 05301

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SUPREME COURT FORM NO. 1-A

ENTRY ORDER

FILED

JUN 26 11 04 AM '78

SUPREME COURT DOCKET NO. 298-77 ...

VERMONT SUPREME COURT
MICHAEL A. RELL,
CLERK

..... June TERM, 19. 78. ...

..... State of Vermont

V.

..... Rodney J. Kelley

APPEALED FROM:

District Court of Vermont
Unit No. 6, Windham Circuit

DOCKET NO.

In the above entitled cause the Clerk will enter:

Motions for Reargument and Stay denied.

BY THE COURT:

Albert W. Barney
Albert W. Barney Chief Justice

Rudolph J. Daley
Rudolph J. Daley

Robert W. Larrow
Robert W. Larrow

Franklin S. Billings, Jr.
Franklin S. Billings, Jr. Associate Justice

William C. Hill
William C. Hill

2M 4/77 VII

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JUNO 6 1978

ENTRY ORDER

SUPREME COURT DOCKET NO. 298-77

APRIL TERM, 1978

State of Vermont

V.

Rodney J. Kelley

APPEALED FROM:

District Court of Vermont
Unit No. 6, Windham Circuit

DOCKET NO.

In the above entitled cause the Clerk will enter:

Fine reduced to fifteen hundred dollars
and judgment affirmed as amended.

BY THE COURT:

Albert W. Barney
Albert W. Barney Chief Justice

Rudolph J. Daley
Rudolph J. Daley

Robert W. Larrow
Robert W. Larrow

Franklin S. Billings
Franklin S. Billings

William C. Hill
William C. Hill Associate Justices

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No. 298-77

JUNO 6 1978

State of Vermont

v.

Rodney J. Kelley

Supreme Court

On Appeal From
District Court of Vermont
Unit No. 6, Windham Circuit

April Term, 1978

Present: Barney, C.J., Daley, Larrow, Billings, and Hill, JJ.

PER CURIAM. In accordance with a plea agreement, the defendant entered pleas of nolo contendere to zoning ordinance violations contained in a 30-count information brought by the Dummerston Town Grand Juror. A judgment of guilty was entered upon the plea to each count, and the cause was continued for disposition pending satisfaction of the plea agreement. Subsequently, the district court decided that the defendant had not satisfied the terms of the plea agreement and he was sentenced to pay a total fine of sixteen hundred dollars plus costs. At sentencing, the defendant orally moved to withdraw his pleas and also moved to disqualify the presiding judge. Both motions were denied, and the defendant appeals.

In the plea agreement entered upon the record, the defendant agreed either to remove within 30 days one of two mobile homes from his property, the placement of which the Town claimed to be in violation of its zoning regulations, or to establish that there was at least one hundred and sixty thousand square feet of property owned by him on which the mobile homes were located. Upon compliance, the Town agreed that no fine should be imposed. At the suggestion of the court, the Town agreed that it would be satisfied if the town zoning administrator was furnished with a survey prepared by a registered surveyor or his certificate that the property contained the required footage.

The defendant contends that he has complied with his part of the agreement and the court erred in not allowing him to withdraw his pleas of nolo contendere and strike the judgments of guilty. The record does not support this argument.

Plea agreement is ambiguous, it requires a survey or certificate from

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a competent surveyor. The memorandum upon which the defendant relies is not a survey or a certificate within the meaning of the plea agreement. It is simply a surveyor's written opinion as to the square footage encompassed in an unverified sketch given him by the defendant.

Contrary to the assertions made by the defendant in his brief and oral argument, we are convinced from the record that he did not comply with the plea agreement and so hold as a matter of law. The trial court was justified in imposing sentence. Furthermore, the defendant has not met his burden of showing that the court abused its discretion in denying his motion to withdraw his pleas of nolo contendere. See State v. Scelza, 134 Vt. 385, 359 A.2d 660 (1976).

We have also examined the defendant's claim of error in the denial of his motions for assignment of counsel and disqualification of the sentencing judge. Both are without merit. The defendant's motion made in this Court to disqualify counsel for the Town is denied.

During argument, counsel for the Town pointed to a discrepancy in the sentence which we correct here because it is an obvious mistake. Although the Town alleged thirty-two violations of its ordinance, it charged the defendant in thirty counts. The court evidently intended to fine the defendant upon each count so the total fine should be fifteen hundred dollars instead of the total assessed, and the sentence is corrected accordingly.

Fine reduced to fifteen hundred dollars and judgment affirmed as amended.

BY THE COURT:

Albert W. Barney
Albert W. Barney, Chief Justice

Rudolph J. Daley
Rudolph J. Daley, Associate Justice

Robert W. Larrow
Robert W. Larrow, Associate Justice

Franklin S. Billings, Jr.
Franklin S. Billings, Jr., Associate Justice

William C. Hill
William C. Hill, Associate Justice

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APPENDIX "C"

Appendix C - Statutes - has not been reproduced.

IN THE SUPREME COURT OF THE STATE OF VERMONT

RODNEY J. KELLEY, appellant)

v.

TOWN OF DUMMERSTON, VERMONT
appellee)

JUL 26 1978

NO. _____

NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

I. Notice is hereby given that Rodney J. Kelley, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final Order of the Supreme Court of Vermont denying a Motion for Reargument and Motion for Stay Pending Appeal which denial affirms the earlier judgment of conviction entered herein on 28 June 1978.

This appeal is taken pursuant to 28 USC 2106.

Appellant was convicted of the crime of violation of a Town of Dummerston zoning ordinance, and was sentenced to pay a fine of one thousand five hundred (\$1,500.00) dollars and is not now in custody or enlarged on bail.

II. The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

a. Each item pertaining to this case since its inception to the date, 23 June 1978.

III. The following questions are presented by this appeal:

a. The denial of counsel by the Trial Court.

b. The failure of the Trial Court to inform Defendant of his right to Court-appointed counsel for his appeal to Vermont Supreme Court, although it allowed him to proceed on appeal in Forma Pauperis.

c. The refusal of the Trial Court to accept a plea withdrawal by Defendant-appellant prior to sentencing.

d. That a second Acting Judge, George Pinkert, signed the Judgment for the Court, but the plea had been made before another

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Acting Judge, Matt L. Divoll.

e. That the Defendant-appellant was in error in entering a plea bargain with prosecutor.

f. That the prosecution failed to keep its part of the plea bargain.

g. That it was beyond the power of the Vermont Supreme Court to correct mistakes of the Trial Court, merely to affirm or reverse decision.

h. That Town of Dummerston never obtained a search warrant to enter Defendant-appellant's property on any occasion.

i. That Defendant-appellant was never served any Notice of Zoning Violation as required under 24 Vermont 4444.

j. That the Statute as written and applied in this case, 24 Vermont 4444, amounts to cruel and unusual punishment.

k. That the Defendant-appellant was denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution.

l. That the sentencing Judge, George Feinberg, was prejudiced against the Defendant-appellant.

Dated: 23 July 1978

Rodney J. Kelley
RODNEY J. KELLEY
DEFENDANT/APPELLANT

15 Pearl Street
Brattleboro, Vermont 05301

PROOF OF SERVICE

I, Rodney Kelley, Defendant-appellant above named, depose and say that on the 24th day of July 1978, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on J. Garvan Murtha, as attorney for Town of Dummerston, Vermont, appellee herein, by mail, depositing the same in a United States post office, with first class postage prepaid, to his address at

5 Grove Street, Brattleboro, Vermont 05301.

Rodney J. Kelley
RODNEY J. KELLEY

SUBSCRIBED AND SWORN TO before me, at West Hartford, Conn.
this 24th day of July, 1978.

19 Marsha G. Keppeler
NOTARY PUBLIC
My commission expires March 31, 1981.